Supreme Court, U.S.
FILED

971551 MAR 19 1998

OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DANNY L. RUSSELL,
Petitioner,

v.

PLANO BANK & TRUST,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

DAVID K. WATSKY
Counsel of Record
GILLESPIE, ROZEN, TANNER
& WATSKY, P.C.
Stemmons Place, Suite 1625
2777 Stemmons Frwy., LB 37
Dallas, Texas 75207-4099
(214) 634-0333
Attorneys for Petitioner,
Danny L. Russell

March 19, 1998

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in ruling that there was no error in the district court's jury instruction on the definition of a "qualified individual with a disability."

2. Whether the Fifth Circuit's ruling that Russell did not make a proper objection to the district court's jury instruction under Rule 51 results in a conflict among the circuits.

3. Whether the Fifth Circuit incorrectly applied Rule 51 to Russell's objections to the district court's instruction on the definition of "qualified individual with a disability."

LIST OF PARTIES

The parties before the court of appeals and this Court are listed in the caption.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
A. Nature of the Case and Proceedings Below	4
B. Factual Background	5
1. Russell's Employment with PB&T	5
2. Russell's Conversation with Chase Regarding Another Position	6
3. Russell's Car Accident and Injuries	6
4. The December 15 Meeting and its Aftermath	8
5. The January 19 Meeting	9
6. Russell's Rehabilitation and the Meeting of the Requirements for His Return to Work	10
7. The July 10 Meeting	10
8. The August 5 Meeting	11
9. Inconsistencies, Pretext, and Disparate Treatment	11
10. Russell's Current Position	13

TABLE OF CONTENTS—Continued

Page

REASONS FOR GRANTING THE WRIT 13

I. THIS COURT SHOULD REVERSE THE FIFTH CIRCUIT'S DECISION AND SETTLE THE VITALLY IMPORTANT ISSUE OF ADA LAW CONCERNING THE DEFINITION OF A "QUALIFIED INDIVIDUAL WITH A DISABILITY" 14

A. Applicable Law on "Qualified Individual With a Disability." 14

B. Russell's Proffered Instruction Correctly Stated The Law 16

C. The District Court's Instruction Constituted a Blatant and Fundamental Error 17

D. The Erroneous Instruction Affected the Outcome of the Case 18

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING RULE 51 OBJECTIONS AND CORRECT THE FIFTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THIS RULE 20

A. Russell's Record Objections Were Valid 21

CONCLUSION 24

TABLE OF AUTHORITIES

Cases Page

Glover v. The BIC Corporation, 6 F.3d 1318 (9th Cir. 1993) 21-23

Riel v. Electronic Data Systems Corporation, 99 F.3d 678 (5th Cir. 1996) 17

Statutes

28 U.S.C. § 1254(1) 2

42 U.S.C. § 12101, *et seq.* 2

42 U.S.C. § 12102 2

42 U.S.C. § 12111(8) 2-4, 14

42 U.S.C. § 12111(9) 3, 15

Rules

Rule 51 of the Federal Rules of Civil Procedure.... 3-4, 14, 20, 22-23

Regulations

29 C.F.R. § 1630.2(0) 14-16

Treatises

Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2553 22

Other

Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act, Equal Employment Opportunity Commission, Section 3.10(III) at III-22 (January 26, 1992) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. ———

DANNY L. RUSSELL,

Petitioner,

v.

PLANO BANK & TRUST,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Danny L. Russell prays for a writ of certiorari to review the opinion and order of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on December 19, 1997.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals was issued on December 19, 1997, and is reported at 130 F.3d 715. It is attached hereto in the Appendix (App. at 1a). The district court issued its Amended Final Judgment on August 23, 1996. (App. at 41a).

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by writ of certiorari after rendering judgment. The decision for which review is sought was entered on December 19, 1997.

STATUTES INVOLVED

Relevant portions of the Americans With Disabilities Act ("ADA"), as amended, 42 U.S.C. § 12101 *et seq.*, are set forth below:

§ 12102. Definitions

As used in this chapter:

* * * *

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

* * * *

§ 12111. Definitions

As used in this subchapter:

* * * *

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or

without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examination, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

* * * *

Relevant portions of the Federal Rules of Civil Procedure are set forth below:

Rule 51. INSTRUCTIONS TO JURY: OBJECTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury.

> The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection out of the hearing of the jury.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Danny L. Russell (hereinafter referred to as "Russell") filed his original complaint on May 19, 1995, alleging that Plano Bank & Trust (hereinafter referred to as "PB&T") discriminated against him in violation of the ADA in failing to provide a reasonable accommodation and in ultimately terminating his employment. On June 12, 1997, the jury returned a verdict that Russell was not a "qualified individual with a disability." On August 23, 1996, the district court entered an Amended Final Judgment, ruling that Russell take nothing on his claims in this case.

Russell appealed the court's take nothing judgment, contending that the district erred in giving the jury an instruction that defined "qualified individual with a disability" without including the reasonable accommodation language from the definition of "qualified individual with a disability" contained in the ADA statute at 42 U.S.C. § 12111(8). On December 19, 1997, the Fifth Circuit issued its opinion, which affirmed the judgment of the district court. Specifically, the Fifth Circuit ruled that the district court's instruction to the jury which did not contain the reasonable accommodation language from the ADA statute was not erroneous, and that Russell's objection to the district court's instruction was not sufficient under Rule 51 of the Federal Rules of Civil Procedure.

B. Factual Background

1. *Russell's Employment with PB&T.*

Russel became employed with PB&T in August 1990 as Vice President of Loans. Russell remained in this position until 1985, when PB&T opened its first branch location, and Russell became Branch Manager over this new bank. From 1980 to 1985, Russell aways received good feedback concerning his performance, and received raises and bonuses.

In 1987, Russell transferred back to the Bank's main location at the request of the Chairman of the Board, Gene Catalano, who had asked Russell to be his assistant. Catalano had approximately seventy percent (70%) of the Bank's entire loan portfolio. Catalano needed help to follow through on all the loans that he was granting and to collect the loans which had already been granted. Russell performed in this position for several months. During this time, Russell began formulating a method for collection of loans, and began to realize the seeds of the Special Assets Department. The Special Assets Department was carved out of Catalano's portfolio, which was in need of immediate and intense collection efforts. Eventually, an outside consultant recommended that PB&T establish a department that would only perform problem loan collections. Accordingly, the Special Assets Department was established in 1987. Initially, Gary Flowers was the head of the Special Assets Department, and Russell reported directly to him. After Flowers was terminated after three to five months, Russell became the head of the department.

By the end of 1990, the probem loans within PB&T was decreasing. In 1988, there was a total of $29,930,000 in classified or problem loans. By the end of 1990, classified loans decreased to approximately $21 million. Russell received positive feedback as a result of his performance in Special Assets during this time period. In March 1990, Russell received an outstanding performance award from the President of PB&T, Doug Myers, along with a bonus

for his work. On November 5, 1991, PB&T gave Russell an exempt employee performance appraisal. In this appraisal, Russell was rated as exceeding expectations, which is the highest rating that a Bank employee can receive.

2. Russell's Conversations with Chase Regarding Another Position.

In November 1991, Russell had a conversation with his supervisor, Jeffrey Chase, about the possibiity that at some point in the future the Special Assets Department would eventually be disbanded. Chase stated that he and Russell needed to talk about where Russell thought he may be interested in going when the Special Assets Department disbands. At no time during this conversation did Chase ever say that once the Special Assets Department was eliminated that there was a possibility PB&T would lay Russell off. Indeed, Chase testified that he specifically mentioned loan review as a potential job for Danny to go into when Special Assets disbanded. Chase stated that at no time was he thinking in terms of a termination, but rather than Russell would move into some other position. At the end of the conversation, Russell said that he would think about it and get back to Chase about what kind of job Russell wanted when Special Assets Department disbanded.

Chase and Russell had another conversation in the spring of 1992 concerning what position Russell might be interested in after the Special Assets Department closed in the future. Chase and Russell talked about combining the Special Assets Department with the Loan Review Department, in which Russell would still do Special Assets, help out in Loan Review, and manage the newly formed department. Russell told Chase that he thought that that was a good idea.

3. Russell's Car Accident and Injuries.

On August 4, 1992, Russell was en route on bank business when he was involved in a car accident. Soon

after the car accident, Russell began having episodes of uncontrollable shaking, which became more frequent and more intense. Although Russell was having seizure-like episodes, he initially attempted to work full-time. Starting in September, however, because of his continuing symptoms, he started working halftime. Finally, on September 28, Russell had a seizure while he was at work. Before Russell went to the hospital, Doug Myers, PB&T's President, told Russell to get himself well, and not to worry about his job, that it would be here when he gets back. Due to the fact that Russell was continuing to have seizures, and they were getting worse, Russell finally went to a neurologist specializing in brain trauma, Dr. John Paul Krusz. Dr. Krusz diagnosed Russell with a brain injury, also known as a post-concussional late effect brain injury. Once Dr. Krusz diagnosed Russell, Dr. Krusz gave him anti-seizure and other medication to help with the symptoms he was experiencing. On October 13, Dr. Krusz informed Russell that it was not advisable that he return to work. Russell promptly informed Chase that he had been to the doctor, that he was on medication, and that his doctor had advised him that he should not return to work at that time.

Richard Fulbright, a clinical neuropsychologist, also treated Russell. Fulbright's speciality is working with people with brain injuries. On October 28, 1992, Fulbright performed a neuropsychological evaluation on Russell. The purpose of the evaluation was to objectively document and measure the effects of the brain injury on Russell's thinking abilities. Fubright's overall finding was that Russell was having difficulty in a variety of areas with respect to his thinking abilities. Although Russell's degree of impairment was significant, Fulbright stated in the evaluation that it was suspected that Russell would be able to show some significant gains, including a partial return to work, within about a three month period following intensive treatment. Fulbright testified that he felt that Russell had a good prognosis for being able to get back to work.

During an intensive three month period from October to December 1992, Fulbright retrained Russell with respect to Russell's learning skills.

4. *The December 15 Meeting and its Aftermath.*

On December 15, 1992, Russell, his wife, and Richard Fulbright met with Jeff Chase to discuss Russell's medical condition and the criteria for Russell's return to work. During the meeting, Fulbright explained to Chase the types of problems that Russell was having and how it was likely to affect his performance on the job. Fulbright and Chase then worked on a plan for Russell to return to work and gradually re-enter the workplace. At this meeting, it was agreed that Russell could return to work for one and a half hours a day until Russell was able to build his cognitive skills up to more hours. Dr. Fulbright stated that Russell could work one and a half hours a day and that Russell could increase the number of hours he worked over a period of time. Dr. Fulbright informed Chase that Russell could return to work in the second full week of January 1993. During the meeting, Chase reacted very favorably to the news that Russell could return to work for one to two hours per day.

Although Chase had reacted favorably to allowing Russell to return to work for one to two hours a day at the December 15, 1992 meeting, the conditions for Russell's return were changed after Chase returned to the Bank. Specifically, Chase had a meeting with Doug Myers, the Bank's President, and Oliver Rose, the Human Resources Manager, and described the meeting between Fulbright, the Russells, and himself. At the meeting, Rose raised the question of whether the Bank should make a reasonable accommodation under the ADA. Rose questioned whether Russell working an hour and a half per day would meet the requirements of doing the main functions of the job. Rose felt that this was not reasonabe and he would not be doing the major functions of the job. After discussing

the essential functions of the job, Chase, Rose, and Myers decided that a reasonable accommodation was for Russell to work four hours a day, which would allow him to perform the essential functions of the position. Thus, on December 28, 1992, Chase wrote Dr. Fulbright a letter informing him that the Bank could not allow Russell to return to work for one to two hours per day, but that the Bank could reasonably accommodate Russell's disability if he could work four hours per day:

> We believe that it would be a reasonable accommodation to restructure the job to a minimum of four hours per day as we have done in the past for Danny. This would enable him to complete the essential functions of the job.

5. The January 19 Meeting.

As a result of the Bank's change of heart, Russell requested another meeting. Another meeting was held on January 19, 1993. In addition to the persons who were present at the previous meeting, Oliver Rose was also present. The Bank reiterated its requirement that Russell would not be able to come back to work on less than a four-hour-a-day schedule. Chase and Rose stated that they had a precedent of other workers who had been ill coming back to work for four hours a day, and that was the Bank's criteria. Although Dr. Krusz had granted a release for Russell to return to work for four hours per day as of December 1992, Dr. Fulbright, however, felt that four hours per day was more than Russell could handle and that Russell could possibly be fired for performance reasons if he tried to work four hours a day. Fulbright suggested to Rose and Chase that if Russell could not ease into work on the job on a gradual basis and gradually increase his workoad, the only other option would be a more expensive and aggressive rehabilitation program. Thus, shortly after the meeting, Fulbright recommended a rehabilitation program that could provide Russell with the type of training which could increase his cognitive endurance to the mini-

mum of four hours per day. Fulbright referred Russell to PATE Rehabilitation, which is an outpatient day program for people who have suffered head injuries. PATE works on rehabilitating peoples thinking abilities so that they can return to work.

6. ***Russell's Rehabilitation and the Meeting of the Requirements for His Return to Work.***

Russell commenced going to PATE Rehabilitation on February 14 or 15, 1993, and was enrolled there for approximately six months. While at PATE, Russell worked on job-related skills and Bank issues, similar to his responsibilties at PB&T. By the end of Russell's treatment at PATE in late June, Russell was up to five or six hours of productive work per day. On July 7, 1993, Russell was discharged from PATE Rehabilitation. Once PATE discharged him, Russell considered himself ready to return to work for four hours per day. All of his treating physicians knew that the goal of treatment for Russell was to meet the criteria of a minimum four hours a day. At no time did any doctor or any other person say that Russell could not go back to work for four hours a day in July 1993. Indeed, as of July 1993, Fulbright was confident that Russell could work for Plano Bank & Trust at four hours per day. PATE Rehabilitation also determined that Russell was able and ready to go back to the essential functions of his position with PB&T within the limited work schedule of four hours per day. The Bank had also acknowledged that Dr. Krusz had previously released Russell to return to work for four hours per day.

7. ***The July 10 Meeting.***

On July 10, 1993, Russell, along with his wife and rehabilitation nurse, Kay Connolly, met with Jeff Chase and Oliver Rose. Russell informed them that he was released from PATE Rehabilitation and could meet PB&T's previously-set criteria for returning to work for four hours

per day. Thus, Russell had met the requirements the Bank gave him for returning to his job in July 1993. However, after Russell informed the Bank that he could return to work for four hours a day, Chase and Rose, for the very first time, informed Russell that they were not sure whether there was a position for Russell at the Bank. Chase told Russell that he was glad that Russell was feeling better but that he wanted Russell to know that he was not real sure that there was a place for Russell to return to work. Chase informed Russell that the Special Assets Department was doing well in reducing loans and that they were not sure that there was a position for Russell. Chase and Rose stated that PB&T was going to eliminate the Special Assets Department. At the conclusion of the meeting, Chase and Rose told Russell that they were going to return to the Bank and see if there was a position available for Russell.

8. ***The August 5 Meeting.***

Russell again met with Chase and Rose on August 5, 1993. At this meeting, Chase informed Russell that he had looked through the Bank and had not found another position for Russell. Chase told Russell that PB&T had come up with a severance package, but that Russell would have to sign a release to obtain it. After Russell refused to sign the release, Rose gave him a termination letter on October 26, in which Rose stated that the Bank had continued to look for a position for Russell but that there was nothing available. The letter went on to state that the Bank was terminating Russell effective October 31, 1993. Although the letter specifically stated that the Bank continued to look for a position for Russell until the date of the letter, Chase admitted that "we stopped looking after we had the meeting with him on August the 5th."

9. ***Inconsistencies, Pretext, and Disparate Treatment.***

There are numerous inconsistencies with the Bank's contention that the Special Assets Department was being

eliminated and that the Bank did not have a position for Russell. First and foremost, in the conversations between Russell and Chase prior to Russell's injury concerning the type of position Russell would like to have once the Special Assets Department went away, at no time did Chase inform Russell that there was any chance that he could be terminated or laid off if there was not a position available. Second, immediately before Russell sustained his head injury, Russell was working more than forty hours per week. At that time, the Bank's classified loan portfolio was down to two million dollars ($2,000,000). As of the July 1993 meeting in which Chase and Rose told Russell that the Special Assets Department was going to be eliminated, classified loans had increased to four million dollars ($4,000,000). Thus, when the department was actually disbanded in 1993, the classified loans (for which the Special Assets Department was responsible) was more than double what it was when Russell was working more than forty hours per week before his car accident. If Russell was busy enough to work more than forty hours per week when classified loan was at a total of two million dollars ($2,000,000), then surely Russell had enough to keep him busy on a four hour per day basis in 1993, when classified loans went up to four million dollars ($4,000,000).

There are even more reasons showing the pretextual nature of the Bank's contention that it did not have a position for Russell. When Chase and Rose informed Russell that the Special Assets Department was going to be eliminated, Russell called his secretary, Nidza Aguilo, and asked her what she knew about the closing of the Special Assets Department. Aguilo told Russell that she was shocked about this news and that she had not heard anything about the closing of the Special Assets Department. Additionally, despite the fact that Russell's absence placed additional responsibilities on Chase, and that he wanted Russell to return to employment to help allegedly wind down the Special Assets Department, PB&T did not

allow Russell to return to work during the six weeks after the July meeting in which the department officially wound down.

Further reasons showing the disparate treatment between Russell and other non-disabled persons is the fact that between January 1, 1993 and January 3, 1994, PB&T had eliminated four jobs. Russell was the only person whose job was eliminated that did not receive a transfer to another position. Indeed, despite the fact that Russell was terminated, the only other person in the Special Assets Department, Nidza Aguilo, was transferred to another department within PB&T. In fact, Aguilo informed Russell that there were new people being hired for a new branch that the Bank was planning on opening.

10. *Russell's Current Position.*

Russell currently works as a private investigator for Del R. Vandiver and Associates approximately twenty to twenty-five hours per week. Russell commenced working for Vandiver in September 1994. Vandiver testified that Russell performed very well, and that he never had a problem not being able to do the job when he was working twenty to twenty-five hours per week. Both Drs. Fulbright and Krusz were aware that Russell is currently employed by Vandive & Associates and working twenty to twenty-five hours per week. Neither doctor has objected to Russell working those hours. Indeed, both Krusz and Fulbright encouraged Russell to return to work for four hours per day.

REASONS FOR GRANTING THE WRIT

There are special and important reasons for granting Russell's Petition for Writ of Certiorari. The Fifth Circuit has decided an important question of ADA law that has not been, but should be, settled by this Court. Specifically, the ADA requires employers to provide reasonable accommodations to individuals with disabilities so that they may perform their jobs. In this regard, the ADA

differs from other discrimination statutes in that it does not merely mandate equality of treatment, but special treatment in terms of reasonable accommodations. The Fifth Circuit's decision that the district court did not err in giving a jury instruction which excluded the term "with or without a reasonable accommodation" from the definition of "qualified individual with a disability" completely obliterates the heart and soul of the ADA.

Additionally, this petition should be granted because the Fifth Circuit decision concerning F.R.C.P. 51 objections to jury instructions is in conflict with the decision of another United States court of appeals on the same important matter. Specifically, the Fifth Circuit ruled that Russell's objections to the district court's instructions to the jury were not sufficient in the face of the district court's specific reference on the record that to the extent Russell's requested instructions were not given in the court's charge, they were refused.

I. THIS COURT SHOULD REVERSE THE FIFTH CIRCUIT'S DECISION AND SETTLE THE VITALLY IMPORTANT ISSUE OF ADA LAW CONCERNING THE DEFINITION OF A "QUALIFIED INDIVIDUAL WITH A DISABILITY"

A. Applicable Law on "Qualified Individual With a Disability."

The ADA defines a "qualified individual with a disability" as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8).

The EEOC Interpretive Guidance provides that an individual with a disability is "otherwise qualified" if he

or she is qualified for a position but, because of a disability, he or she needs a reasonable accommodation to be able to perform a job's essential functions. 29 C.F.R. § 1630.2(m). Under those circumstances, an employer would be obligated to provide a reasonable accommodation to enable the person to be able to perform the job's essential functions. *Id.*

The statute specifically references the types of reasonable accommodations which are appropriate:

> The term 'reasonable accommodations' may include—
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) *job restructuring, part-time or modified work schedules*, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examination, training materials, or policies, the provisions of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (emphasis added).

Although the list is inclusive of possible reasonable accommodations, it is by no means exhaustive. 29 C.F.R. § 1630.2(o).

An accommodation is defined as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. § 1630.2(o). The reasonable accommodation requirement is intended as a vehicle to remove or alleviate barriers to equal employment opportunities for individuals with disabilities. *Id.* These barriers could be . . . "rigid work schedules which permit no flexibility as to when work is performed or breaks taken. . . ." *Id.* To ascertain the appropriate

accommodation that is effective for the individual, the employer may have to initiate an "informal, interactive process with the qualified individual with a disability in need of the accommodation." *Id.*

The ADA statute and EEOC regulations specifically provide that an employer may reasonably accommodate an individual with a disability by providing for part-time or modified work schedules. 29 C.F.R. § 1630.2(o). The importance of this accommodation is reflected by the EEOC's observation in its Technical Assistance Manual that many people with disabilities are fully qualified to perform jobs with the accommodation of a modified work schedule. *See Technical Assistance Manual on the* Employment Provisions (Title I) of the Americans with Disabilities Act, Equal Employment Opportunity Commission, Section 3.10(III) at III-22 (January 26, 1992). The Manual recognizes that some people cannot work a standard nine to five work day or a standard Monday-Friday work week. *Id.* The EEOC Technical Assistance Manual also provides that people whose disabilities may need modified work schedules include . . . "people who need rest periods . . ." Technical Assistance Manual at III-23.

B. Russell's Proffered Instruction Correctly Stated The Law.

There can be no dispute that Russell's proffered instruction correctly stated the law concerning the definition of a "qualified individual with a disability." The instruction correctly tracks the definition of a "qualified individual with a disability" as stated in 42 U.S.C. § 12111(8), as well as the EEOC Regulations and interpretive Guidance. It is plainly apparent that a disabled person must be reasonably accommodated if it would allow him to perform a job's essential functions. The Fifth Circuit acknowledged that Russell's proffered instruction correctly stated the law:

> "As Russell's proffered instruction tracked the language of the ADA, there is no question that it was a correct statement of the law."

(Russell at 719).

C. The District Court's Instruction Constituted a Blatant and Fundamental Error.

There is no doubt that the district court's definition of "qualified individual with a disability" was purely and simply wrong. The court's instruction failed to make any mention of the fact that a disabled person may meet the definition of "qualified individuals with a disability" by showing he can perform the essential functions of the position *with a reasonable accommodation.* The failure of the district court to include the reasonable accommodation language tainted the jury's response to Interrogatory No. 1 of the verdict form. (App. at 38a).

In *Riel v. Electronic Data Systems Corporation*, 99 F.3d 678 (5th Cir. 1996), the Fifth Circuit emphasized the critical importance that reasonable accommodations play in the ADA:

> The ADA mandate that employers must accommodate sets it apart from most other anti-discrimination legislation. Race discrimination statutes mandate equality of treatment, in most cases prohibiting consideration of race in any employment decision. In contrast, an employer who treats a disabled employee the same as a non-disabled employee may violate the ADA. By requiring reasonable accommodation, the ADA shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities.

Riel at 681.

As the Fifth Circuit in *Riel* has so aptly described, the ADA's heart and soul is the requirement to reasonably accommodate a disabled individual. The court's failure to instruct the jury on the fact that a disabled person may

need a reasonable accommodation to perform the essential functions of the position flies in the face of the ADA's intent, purpose and scheme. Thus, it is quite clear that the failure of the court to include reasonable accommodation language in the definition of a "qualified person with a disability" created substantial and ineradicable doubt whether the jury was properly guided in its deliberation as to whether Russell was a "qualified individual with a disability."

D. The Erroneous Instruction Affected the Outcome of the Case.

In this litigation, the erroneous instruction concerning the definition of a "qualified individual with a disability" clearly affected the outcome of the case. This entire case revolved around the issue of whether Russell could perform the essential functions of his job *with a reasonable accommodation*. PB&T itself framed the issue when it stated, in writing, that it could reasonably accommodate Russell's disability if he could work four hours a day. In a December 28, 1992 letter from Chase to Fulbright, the Bank proposed a reasonable accommodation as follows:

> We believe that it would be a reasonable accommodation to restructure the job to a minimum of four hours per day as we have done in the past for Danny. This would enable him to complete the essential functions of the job.

There was never a time during this entire litigation in which the reasonable accommodation of working four hours per day was not at the heart of the case. It was certainly not Russell's contention that he could perform his job without the reasonable accommodation of a modified work schedule of four hours per day.

When it came time to deliberate, however, the jury was not given the opportunity to consider that Russell could be a qualified individual with a disability even

though he needed a reasonable accommodation of a modified work schedule of four hours per day. For the seven months from the time the Bank informed Russell that he would have to work four hours a day before he could return to work, Russell put all his efforts into meeting this accommodation. After going through intense rehabilitation at PATE Rehabilitation, and receiving a discharge from PATE to return to work, and with the full support and encouragement of his doctors, Krusz and Fulbright, in July 1993 Russell could perform the essential functions of his position *with the reasonable accommodation of working four hours per day*. Since the jury was not properly instructed concerning Russell being able to prove that he was a "qualified individual with a disability" with the reasonable accommodation of working four hours per day, the erroneous instruction undoubtedly affected the jury's answer to Interrogatoy No. 1. As the jury was instructed to stop answering any more interrogatoies because of its negative answer to the first interrogatory, the tainted answer resulted in an improper judgment for PB&T. The very essence of the ADA is the fact that individuals with a disability have the right to a reasonable accommodation. The jury in this case was not allowed to consider this important fact as a direct result of the district court's erroneous instruction.

In its opinion, the Fifth Circuit acknowledged that "Russell's preferred instruction tracked the language of the ADA," and that there "is no question that it was a correct statement under the law." *Russell* at 719. The Fifth Circuit, however, ruled that the instruction was not erroneous because the jury instructions mentioned the words "reasonable accommodation" in another section of the instruction. *Id.* at 721. There is one overwhelming problem with the Fifth Circuit's reasoning. Since the court's definition of "qualified individual with a disability" did not include the term "with or without reasonable accommodation," the jury would not have been in a position to consult the definition of reasonable accommodation

in determining the question of whether Russell was a "qualified individual with a disability."

The Fifth Circuit's opinion in essence means that the reasonable accommodation requirements of the ADA are meaningless. Most disabled persons need reasonable accommodations to perform the essential function of their positions. The Fifth Circuit's ruling turns the ADA on its head. Without the requirement of reasonable accommodations, there is nothing left to the ADA. The Fifth Circuit's ruling in this ADA case would be equivalent to ruling in an age discrimination case that the jury does not have to be instructed that the age discrimination laws apply to persons forty years or older.

This Court has not ruled on ADA issues since the enactment of the ADA in 1992. This case would serve to settle the most important question under the ADA laws, the requirement of reasonably accommodating disabled persons. Accordingly, this Court should grant Russell's Writ of Certiorari on this vital issue of ADA law.

II. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING RULE 51 OBJECTIONS AND CORRECT THE FIFTH CIRCUIT'S ERRONEOUS INTERPRETATION OF THIS RULE

In its opinion, the Fifth Circuit determined that Russell's objections to the court's jury instruction concerning the definition of "qualified individual with a disability" was "not specific enough to apprise the district court of this particular problem with the challenged instruction, and it therefore failed to satisfy the requirements of Rule 51." *Russell* at 720. As will be fully shown below, the Fifth Circuit's ruling that Russell's objection was insufficient is in conflict with the decision of another court of appeals on the very same important issue.

A. *Russell's Record Objections Were Valid.*

After the judge read the instructions to the jury, the district court asked for objections to the court's charge. At that time, Russell made the following objection:

> "Can we just have an objection that to the extent that the Plaintiff's requested instructions were not given, we would object on that ground."

In response, the district judge stated the following:

> Alright, Mr. Watsky. The objections will be overruled. And the court will state for the record to the extent the requested instructions of the Plaintiff were not substantially covered—given in the court's charge, they are refused. *Id.*

Based upon the statements of Russell's counsel and the court, it is clear that Russell properly preserved the court's failure to give his requested instruction concerning the definition of a "qualified individual with a disability."

In this regard, this case is similar to *Glover v. The BIC Corporation*, 6 F.3d 1318 (9th Cir. 1993). In *Glover*, the defendant sought a new trial "because the district court declined to give [the defendant's] requested instructions concerning [the plaintiff's] burden of proving [the defendant's] conduct was a 'substantial factor' in causing the fire." *Glover* at 1325. As in the present case, the plaintiff in *Glover* argued that the defendant was "precluded from raising this issue on appeal because it failed to properly object at trial." *Id.* The defendant had "neither objected to the alleged insufficiency of the causation instruction during the court's review of the instructions with counsel, nor raised an objection after the charge was read to the jury." *Id.* at 1326. The Ninth Circuit stated, however, that "following a short recess after its review of the final instructions with counsel, the district court noted for the record, 'I am considering each party has an exception for any requested instruction which the court did not give.'" *Id.*

The Ninth Circuit ruled that based upon these facts, the defendant had sufficiently preserved its appeal of the district court's failure to give the defendant's proposed causation instructions. *Glover* at 1327. The basis of the court's ruling was that (1) the defendant had "offered causation instructions, which were rejected by the court, that correctly stated the requirement of causation under Oregon law," and (2) "the district court informed [the defendant] that the court had noted for the record [the defendant's] objection to any requested instructions the court did not give." *Id.* The court of appeals then ruled that the "proposed instructions are accurate statements of the law which should have brought to the court's attention the failure of the general charge to adequately address the issue of causation." *Id.*

The facts in the present case are just as strong as the facts in *Glover*. It is beyond a doubt that Russell proposed a correct instruction concerning the definition of a "qualified individual with a disability." Additionally, as in *Glover*, the trial court specifically allowed Russell to object to the instructions to the extent that Russell's requested instructions were not given. Thus, on virtually the very same set of identical facts, the Ninth Circuit ruled that a party's objections were in compliance with F.R.C.P. 51, while the Fifth Circuit has ruled just the opposite. This is a clear conflict in the decisions of the courts of appeal on a very important issue of Rule 51 objections.

The Fifth Circuit acknowledged that "a party may be excused from the requirement of making a specific objection only where 'the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing.'" *Russell* at 720, 9A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2553. The Fifth Circuit, however, held that Russell was not excused from the Rule 51 requirement because "there is no evidence in the record that Russell's position regarding the omission of the words

'with or without reasonable accommodation' from the paragraph defining qualified individual with a disability was made clear to the trial judge." *Russell* at 720.

Despite the Fifth Circuit's conclusory statement that Russell did not make it known to the court his position on reasonable accommodations, the record clearly shows that the trial court was well aware of Russell's position in this regard throughout the entire case. First and foremost, the court was well aware of Russell's position through the Bank's motion for summary judgment. The entire basis of the Bank's motion for summary judgment was that Russell was not a "qualified individual with a disability." The district court noted as much in its Memorandum Opinion and Order denying PB&T's motion for summary judgment when it stated that "the Bank argues that Russell was not a "qualified individual with a disability." Throughout Russell's brief in support of Russell's response to the Bank's motion for summary judgment, Russell emphasized that he must merely prove that he is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." Furthermore, since the Bank's approach to this case was that Russell was not a "qualified individual with a disability" during the trial phase, Russell hammered, again and again, on the fact that he could perform the essential functions of his position with the reasonable accommodation of working four hours per day. Thus, there can be no dispute that Russell made the district court fully aware of Russell's position and that he did not need to present a further objection to the court's charge concerning the definition of a "qualified individual with a disability."

This Court should settle the conflict in the circuits in favor of the Ninth Circuit's holding in *Glover*. There can be no doubt that an objection to a jury instruction is sufficient under Rule 51 where the district court specifically gives its consent to a party to object to the court's

instructions to the extent they differ with the party's requested instructions of the party. This is especially true where a party has previously made it clear to the trial judge its position in connection with the instruction at issue.

CONCLUSION

For all of the reasons stated herein, Russell's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID K. WATSKY
Counsel of Record
GILLESPIE, ROZEN, TANNER
& WATSKY, P.C.
Stemmons Place, Suite 1625
2777 Stemmons Frwy., LB 37
Dallas, Texas 75207-4099
(214) 634-0333
Attorneys for Petitioner,
Danny L. Russell

March 19, 1998